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No. 96-776

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

BOARD OF EDUCATION OF THE
ENLARGED CITY SCHOOL DISTRICT OF THE
CITY OF WATERVLIET, NEW YORK,
Petitioner,

-v-

COLLEEN RUSSMAN, A CHILD WITH
DISABILITIES, BY HER PARENTS,
PATRICIA AND PAUL RUSSMAN,
Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT'S SUPPLEMENTAL BRIEF

Respondent, Colleen Russman, submits this supplemental brief in response to the brief of the United States as Amicus Curiae in *K.R. v. Anderson Community School Corp.*, 81 F.3d 673 (7th Cir. 1996), *petition for cert. pending*, No. 96-323 (filed Aug. 25, 1996). The United States expresses its views on the impact of the Individuals with Disabilities Act Amendments of 1997 (IDEA Amendments Act) on the rights of private school children with disabilities[1] to receive publicly funded special education supportive services, and consequently on the petitions for certiorari pending in *K.R. v. Anderson* as well as in *Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996), *petition for cert. pending sub nom. Board of Educ. v. Russman*, No. 96-776 (filed Nov. 18, 1996), and *Fowler v. Unified School District No. 259*, 107 F.3d 797 (10th Cir. 1997), *petition for cert. pending*, No. 96-1633 (filed Apr. 14, 1997).

The United States asserts that the Individuals with Disabilities Education Act (IDEA) as amended by the IDEA Amendments Act limits school districts' mandate to assist private school children with disabilities to a proportional amount of federal funds. (United States brief at 8). The United States further suggests that the decision of the Court of Appeals in *Russman* is inconsistent with the IDEA as amended and should, therefore, be remanded.[2] (United States brief at 14)

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[1] Unless otherwise noted, "private school children with disabilities" refers to children enrolled voluntarily by their parents in private school as distinguished from children placed by school districts.

[2] The United States Court of Appeals held in *Russman* that the IDEA and regulations require that necessary services be provided to private school children in accordance with their needs, and that on-site assistance may be denied at a private school only when it would be "significantly more expensive" than providing the same service at public school. (P. App. A at 14a) The United States also proposes that *Fowler* be remanded. The court in *Fowler*, like *Russman*, recognizes the rights of pupils with disabilities in private schools to receive IDEA services, at least where the

The respondent disagrees. The interpretation of the IDEA amendments put forth by the United States cannot be reconciled with States' continuing obligations under the IDEA to address the individual needs of all children with disabilities, including children voluntarily placed in private schools, and to use federal funds to supplement, rather than supplant, the use of state and local funds. Regardless of the position of the United States, however, the IDEA Amendments Act should have no bearing on this Court's review of the petition for certiorari in *Russman*.

1. THE IDEA AMENDMENTS ACT OF 1997 OBLIGATES SCHOOL DISTRICTS TO PROVIDE SERVICES TO CHILDREN WITH DISABILITIES ATTENDING PRIVATE SCHOOL.

The IDEA Amendments Act leaves unchanged the requirement that for children with disabilities enrolled by their parents in private school, "provision is made for the participation of those children in the program assisted or carried out under [Part B] by providing for such children special education and related services...". IDEA (as amended) §612(a)(10)(A). The IDEA Amendments Act of 1997 adds, however, that the "[a]mounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part." IDEA (as amended) §612(a)(10)(A)(i)(I). The IDEA Amendments Act further states that "services may be provided to children with disabilities on the premises of private, including parochial, schools to the extent consistent with law." IDEA (as amended) §612(a)(10)(A)(i)(II).

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provision of such services would be no more costly than the same service provided in the public school. *Fowler*, 107 F.3d 797, 807-808.

The United States concedes that the IDEA as amended requires some benefits be provided to private school students. (United States brief at 3). But, the United States argues that the IDEA obligates school districts to provide such benefits only to the extent of a proportional share of federal funds received under Part B. In other words, state and local funds need not be applied to meet the needs of some children with disabilities. Children attending private schools may be excluded. Since federal funds, as currently appropriated, constitute only six to eight percent of the cost of educating a child with disabilities, only the most minimal needs can be met. Thus, the United States reasons, *K.R.*'s claim for individual services, and presumably the claims of many other children with disabilities attending or seeking to attend private school, are effectively moot. (United States brief at 11).

The respondent disagrees that the IDEA as amended so limits a school district's responsibility to provide special education and related services to private school children with disabilities. At best, the IDEA Amendments Act is ambiguous as to funding source, but not as to the nature of services required. While the IDEA clarifies that school districts must use a proportional amount of federal funds for services to children attending private schools, the Act itself is silent as to the specific use of state and local resources to meet this obligation to private school students. Had it been the specific intent of Congress to severely limit services to private school students with disabilities, or to waive any required application of state and local funding for providing services, the IDEA Amendments Act could have stated so unequivocally.

a. The position of the United States is inconsistent with the overall purpose of the IDEA as well as with several of its provisions as amended.

The interpretation of IDEA (as amended) §612(a)(10)(A) offered by the United States is inconsistent with the findings

and purposes of the IDEA as a whole which stress access to educational assistance and equality of opportunity for *all* children with disabilities. It is also inconsistent with other specific provisions of the IDEA as amended.

For example, in amending the IDEA, Congress found in part:

> While States, local educational agencies, and educational service agencies are responsible for providing an education for *all children with disabilities*, it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law. IDEA (as amended) §601(c)(6) (emphasis added)

The stated purposes of the IDEA as amended further include the following:

> (1) (A) to ensure that *all* children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;
>
> (B) to ensure that the rights of children with disabilities and parents of such children are protected; and
>
> (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of *all* children with disabilities; . . . IDEA (as amended) §601(d) (emphasis added)

Thus, in defining the goals and purposes of the IDEA, Congress makes no distinctions between public and private school students with disabilities.

The interpretation of Section 612(a)(10)(A) urged by the United States is also incompatible with other IDEA eligibility requirements contained in Section 612. For example, for a State to be eligible for assistance under Part B of the IDEA, the State must have in effect policies and procedures to ensure a "free and appropriate public education is available to *all* children with disabilities. . ." IDEA (as amended) §612(a)(1)(A) (emphasis added). Further,"[t]he State has established a goal of providing full educational opportunity to *all* children with disabilities. . ." IDEA (as amended) §612(a)(2) (emphasis added). Significantly, although the IDEA contains a "LIMITATION" provision which limits the obligation to provide a free appropriate public education in some instances, there is no mention of privately placed children with disabilities in that provision. IDEA (as amended) §612(a)(1)(B).[3]

Children attending private schools are specifically included in the States' "Child Find" obligations:

> All children with disabilities residing in the State, *including children with disabilities attending private schools*, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located and evaluated and a practical method is developed and implemented to determine which children with disabilities are

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[3] The IDEA Amendments Act limits the obligation of school districts to make a free appropriate public education available with respect to children aged 3-5 and 18-21 where inconsistent with state law or practice, and to incarcerated 18-21 year olds who were not identified prior to incarceration in adult prisons. IDEA (as amended) §612(a)(1)(B).

> currently receiving needed special education and related services. IDEA (as amended) §612(a)(3)(A) (emphasis added). (See also, IDEA (as amended) §612(a)(10)(A)(ii)).

Moreover, an individualized education program must be developed "for each child with a disability". IDEA (as amended) §612(a)(4). These provisions cannot be reconciled with the United States' interpretation of Section 612(a)(10)(A). It is contradictory to require states to provide full educational opportunity for all children with disabilities, and to identify, evaluate and develop individualized education programs for all children with disabilities, including private school children, if the states do not then actually provide the necessary services.

Finally, the very purpose of IDEA funding is to assist rather than supplant the states in meeting the educational needs of all children with disabilities. The section of the IDEA addressing services to private school children with disabilities specifically states that provision be made for the participation of children "*assisted* or carried out under this part..." IDEA (as amended) 612(a)(10)(A)(emphasis added). The United States' interpretation of 612(a)(10)(A), insofar as it totally supplants the use of state and local funding, cannot be reconciled with the requirements that the states supplement rather than supplant their use of state and local funds for the provision of services to all children with disabilities. Section 612(a)(18)(C) specifically prohibits supplantation:

> [F]unds paid to a State under this part will be used to supplement the level of Federal, State, and local funds...expended for special education and related services provided to children with disabilities under this part and *in no case to supplant* such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all

> children with disabilities have available to them a free appropriate public education . . . IDEA (as amended) §612(a)(18)(C) (emphasis added).

b. The application of the IDEA Amendments Act as proposed by the United States is inconsistent with the Americans with Disabilities Act and the Rehabilitation Act of 1973.

The United States fails to consider the Americans with Disabilities Act and other prohibitions against discrimination based on disability in its analysis. The Americans with Disabilities Act provides:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation or be denied the benefits of the services, programs, or activities of a public entity. 42 U.S.C. §12131.

Regulations promulgated by the United States Department of Justice clarify that a public entity may not:

> [p]rovide a qualifed individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result to gain the same benefit, or to reach the same level of achievement as that provided to others. 28 C.F.R. §130.

Similarly, Section 504 of the Rehabilitation Act provides:

> "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. §794.

Under the United States' proposed analysis, school districts are encouraged to deny services in private schools to students with severe disabilities based on cost. Thus, private school children with disabilities who are otherwise qualified to participate in the benefits of the IDEA and state special education programs, may, nevertheless, be denied such benefits by reason of their disabilities in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. §§12131-12134, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

c. The effect of the IDEA Amendments, as interpreted by the United States, will be to deny children with disabilities the choice of attending private schools.

The United States argues that the high cost of meeting the needs of private school children with disabilities is incentive for states to withdraw from the IDEA altogether. This analysis is flawed. In the present case for example, the Watervliet School District saved no money by denying Colleen Russman necessary supportive services at the private school selected by her parents. Since Colleen was unable to benefit from her private school program without school district assistance, she was forced to forego her choice of a private school altogether and enroll in the public school. This result, the Court of Appeals notes, is inconsistent with the IDEA. (P. App. A at 16a). The school district ended up expending the same amount of money on identical services in the public school as it would have at the private school.[4]

Finally, where, as here, denial of services to a child with disabilities precludes a child's attendance at a parochial school,

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[4] The Court of Appeals noted that the Watervliet school district did not claim that it would cost significantly more to provide services to Colleen at the private rather than the public school. (P. App. A at 15a).

then the child's and family's right to freely exercise religious choice under the First Amendment to the United States Constitution is also implicated. See e.g., *Pierce v. Society of Sisters of the Holy Names*, 268 U.S. 510 (1925); *Sherbert v. Verner*, 374 U.S. 398 (1963).

2. THE IDEA AMENDMENTS ACT OF 1997 SHOULD HAVE NO EFFECT ON THIS COURT'S REVIEW OF THE PETITION FOR CERTIORARI IN *WATERVLIET v. RUSSMAN.*

The United States argues that even if the Second Circuit decision in *Russman* was justified under the IDEA, 20 U.S.C. §1413(a)(4)(A), prior to amendment, it now conflicts with the IDEA Amendments Act of 1997. The Amendments Act should have no impact, however, on the issues presented in *Russman*. As discussed in respondent's brief in opposition, petitioner Watervliet School District conceded in open court below the only issue it seeks to review. The school district agreed that it was required to provide on-site assistance to children with disabilities attending private schools, and that it would have provided a teaching aide and consultant teacher to Colleen Russman had she elected to attend a non-sectarian private school. (R. App. B at 5ra-7ra). As the United States Court of Appeals for the Second Circuit observed, the only reason offered by the school district for denying services to Colleen Russman was its view that such assistance would be precluded by the Establishment Clause of the First Amendment. (P. App A at 15a-16a). The Second Circuit held that the Establishment Clause does not bar such services; and the petitioner school district does not challenge this holding. In short, the reauthorization of the IDEA does not alter the question of whether the district should be able to raise in the Supreme Court, a defense it previously waived in the United Stated Court of Appeals.

The IDEA Amendments Act does indeed clarify that on-site assistance to children with disabilities is permitted including at parochial schools 612(a)(10)(A)(i)(II).[5] Thus, to the extent that the IDEA amendments specifically permit on site services at parochial schools, there is again no reason to review the decision below. A remand will not change the outcome for the parties in this case, but will lead to several years of additional litigation, ultimately with the same result.

CONCLUSION

For reasons stated above and in Respondents Brief in Opposition, the decision of the United Stated Court of Appeals for the Second Circuit in *Board of Ed. v. Russman* should stand and the petition for certiorari should be denied.

Respectfully submitted,

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[5] It was intent of Congress to codify the decision of *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) by explicitly allowing on-site assistance at private schools. H.R. Rep. No. 95, 105th Cong., 1st Sess. 93 (1997).

Appendix

APPENDIX A

Statutory and Regulatory Provisions:

Individuals With Disabilities Act, as amended by the Individuals With Disabilities Act Amendments of 1997 (to be codified at 20 U.S.C. 1400 *et seq.* (Supp. 1997)):

§601(c) FINDINGS

(6) While States, local educational agencies, and educational service agencies are responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

§601(d) PURPOSES- The purposes of this title are--

(1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, education service agencies, and Federal agencies to provide for the education of all children with disabilities.

§612 STATE ELIGIBILITY

(a)(1) FREE APPROPRIATE PUBLIC EDUCATION

(A) IN GENERAL - A free appropriate public education is available to all children with disabilities residing in the State between the ages 3 and 21, inclusive,

including children with disabilities who have been suspended or expelled from school.

(B) LIMITATION - The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children--

(i) aged 3 through 5 and 18 through 21 in a state to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this part be provided to children with disabilities who were not actually identified as being a child with a disability under section 602(3) immediately prior to their incarceration in adult prisons.

§612(a)(2) FULL EDUCATIONAL OPPORTUNITY GOAL-

The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

§612(a)(3) CHILD FIND-

(A) IN GENERAL- All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and

implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) CONSTRUCTION- Nothing in this Act requires that children be classified by their disability so long as each child who has a disability listed in section 602 and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this part.

§612(a)(4) INDIVIDUALIZED EDUCATIONAL PROGRAM-

An individualized educational program, or an individualized family service plan that meets the requirements of section 636(d), is developed, reviewed, and revised for each child with a disability in accordance with section 614(d).

§612(a)(10) CHILDREN IN PRIVATE SCHOOLS-

(A) CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS-

(i) IN GENERAL-To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.

(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

(ii) CHILD-FIND REQUIREMENT-The requirements of paragraph (3) of this subsection (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial elementary and secondary schools.

§612(a)(18) SUPPLEMENTATION OF STATE, LOCAL, AND OTHER FEDERAL FUNDS

(A) EXPENDITURES- Funds paid to a State under this part will be expended in accordance with all the provisions of this part.

(B) PROHIBITION AGAINST COMMINGLING- Funds paid to a State under this part will not be commingled with State funds.

(C) PROHIBITION AGAINST SUPPLANTATION AND CONDITIONS FOR WAIVER BY SECRETARY- Except as provided in section 613, funds paid to a State under this part will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this part and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and

convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.